



Billing Code: 6750-01-S

## **FEDERAL TRADE COMMISSION**

### **Agency Information Collection Activities; Submission for OMB Review; Comment Request**

**AGENCY:** Federal Trade Commission (“FTC” or “Commission”).

**ACTION:** Notice.

**SUMMARY:** The information collection requirements described below will be submitted to the Office of Management and Budget (“OMB”) for review, as required by the Paperwork Reduction Act (“PRA”). The FTC seeks public comments on proposed information requests sent pursuant to compulsory process to a combined ten or more of the largest domestic cigarette manufacturers and smokeless tobacco manufacturers. The information sought would include, among other things, data on annual sales and marketing expenditures. The current FTC clearance from the Office of Management and Budget (“OMB”) to conduct such information collection expires December 31, 2020. The Commission intends to ask OMB for renewed three-year clearance to collect this information.

**DATES:** Comments on the proposed information requests must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](https://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review - Open for Public Comments” or by using the search function. The reginfo.gov web link is a United States Government website produced by OMB and the

General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the proposed collection of information should be addressed to Michael Ostheimer, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mailstop CC-10507, Washington, DC 20580, (202) 326-2699.

**SUPPLEMENTARY INFORMATION:**

*Title:* FTC Cigarette and Smokeless Tobacco Data Collection.

*OMB Control Number:* 3084-0134.

*Type of Review:* Extension of a currently approved collection.

On June 25, 2020, the FTC sought public comment on the information collection requirements associated with the Cigarette and Smokeless Tobacco Data Collection. 85 FR 38139. Four germane comments were received. Pursuant to the OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.*, the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Cigarette and Smokeless Tobacco Data Collection.

In response to the June 25, 2020 Notice, the Commission received comments from the Campaign for Tobacco-Free Kids ("CTFK"), the American Lung Association ("ALA"), Truth Initiative, and Altria Client Services ("Altria").

*I. CTFK*

The CTFK comment specifically noted the utility and importance of the Commission's Cigarette and Smokeless Tobacco Reports, and urged the agency to continue collecting and reporting industry sales and marketing expenditure data, which CTFK stated provide "critical

data to researchers, policymakers, advocates and the general public.” CTFK additionally observed:

The FTC is currently the only public source for data on cigarette and smokeless tobacco companies’ marketing and promotional expenditures. No other agency collects and publishes such information directly from the companies, making the FTC reports the most accurate and reliable assessment of tobacco marketing and promotion expenditures available.

CTFK at 1. CTFK, however, suggested certain modifications to the Commission’s reports.

Specifically, CTFK recommended that the Commission: (1) clarify in which category coupons that consumers obtain online are to be counted; (2) report data on a company-specific or brand-specific basis, rather than on a fully-aggregated basis; (3) require manufacturers to report expenditures related to corporate sponsorships and advertisements; and (4) publish reports within one year of data collection. *Id.* at 2. CTFK also requested that the FTC extend its data collection to include electronic cigarettes (“e-cigarettes”) and cigars.<sup>1</sup>

The Commission’s proposed Orders clarify that expenditures on coupons delivered online should be reported together with coupons delivered by other means. The full impact of couponing by the major cigarette and smokeless tobacco manufacturers can only be seen if expenditures for all coupons are reported together, regardless of how those coupons are delivered to consumers.

Regarding CTFK’s suggestion that data be reported on other than a fully-aggregated, nationwide basis, the cigarette and smokeless tobacco companies assert that those data are confidential and, as CTFK acknowledges, the Commission cannot publicly release trade secrets or certain commercial or financial information. *Id.* at 2, n.2.

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<sup>1</sup> Two other commenters, ALA and Truth Initiative, made the same suggestion. The collection of data regarding e-cigarettes or cigars is beyond the scope of this proposed collection. Note though that the FTC has a separate ongoing study on e-cigarettes. See FTC Press Release, *FTC to Study E-Cigarette Manufacturers’ Sales, Advertising, and Promotional Methods* (Oct. 3, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional>.

The Commission has for a number of years required the recipients of its 6(b) Orders to report certain expenditures related to corporate sponsorships and advertisements made in the name of the company, rather than any of its brands.<sup>2</sup> The Commission has not included those data in its Cigarette and Smokeless Tobacco Reports, and has therefore decided to cease collecting this information.

Regarding CTFK's suggestion to publish reports within one year of data collection, the Commission always strives to publish the Cigarette and Smokeless Tobacco Reports as quickly as possible. It takes the recipients of its 6(b) Orders time to submit their reports and they may request extensions, such as this year due to the COVID-19 pandemic. After reviewing the resulting reports, staff often has to go back to one or more of the 6(b) Order recipients for clarifications and corrections. The data also requires analysis, and the reports require writing and review and approval at multiple levels. The Commission does in fact usually publish the Cigarette and Smokeless Tobacco Reports well within a year of when the data is first submitted.

## *II. ALA*

The ALA comment stated that the Commission's Cigarette and Smokeless Tobacco Reports provide "valuable information on cigarette and smokeless tobacco products sales and marketing that is used on an ongoing basis in the Lung Association's education and public policy activities related to preventing and reducing tobacco use." ALA at 1. ALA additionally observed:

These data are also important for public health officials and other organizations working to reduce the terrible burden caused by tobacco. By understanding how much tobacco companies spend on marketing and the distribution channels they

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<sup>2</sup> Both the cigarette and smokeless tobacco Orders required the recipients to report expenditures on "public entertainment events (including, but not limited to, concerts and sporting events) bearing or otherwise displaying the name of the Company or any variation thereof but not bearing or otherwise displaying the name, logo, or an image of any portion of the package" of any of its cigarettes or smokeless tobacco products, or otherwise referring to those products.

use, it allows public health officials to determine where and how best to deliver tobacco prevention and cessation messages.

*Id.*

### III. *Truth Initiative*

Truth Initiative's comment stressed the critical importance and utility of the Cigarette and Smokeless Tobacco reports. Truth Initiative at 1. It said that the reports provide information that is not available elsewhere and is not duplicative of other data collections. *Id.* Truth Initiative believes the reports often provide the basis for strong public health policies with regard to tobacco use and marketing and such policies save lives. *Id.*

Truth Initiative, however, suggested certain modifications to the Commission's reports. Specifically, Truth Initiative recommended that the Commission: (1) collect information regarding heated tobacco products with its cigarette Orders; (2) collect information regarding low nicotine cigarettes; (3) reinstate previously asked questions requesting lists of new and discontinued cigarette products; (4) collect information regarding nicotine pouches and lozenges that do not contain tobacco; (5) collect information regarding the flavors of smokeless tobacco products; (6) clarify that streaming shows are included in questions about product placement; (7) define "youth" as persons younger than 18 years of age and "underage" as persons younger than 21 years of age. *Id.* at 2-6.

The Commission agrees that heated, non-combusted tobacco products are an important emerging segment of the tobacco market. The Commission plans to monitor these products and will consider whether and how best to collect information about these products when the market has further developed to make such information collection warranted.

As for Truth Initiative's suggestion that the Commission collect information regarding low-nicotine cigarette products, none of the current recipients of the cigarette Orders sell such

products. The Commission's Cigarette Reports focus on the largest cigarette manufacturers and do not attempt to present a complete picture of the cigarette market. There are numerous smaller manufacturers and importers of cigarettes to which the Commission does not direct its cigarette Orders. The Commission does not intend, at this time, to seek information specifically regarding low nicotine cigarettes or to direct an Order to the one company that has expressed an intention in marketing such products.

In 2017, the Commission determined that it no longer needed lists of cigarettes first sold or discontinued in a calendar year and it does not see a sufficient basis to revisit that decision.

As the Truth Initiative notes, nicotine pouches and lozenges are currently being marketed by some of the major smokeless tobacco companies, and are an important emerging segment of the tobacco market. *Id.* at 4. The Commission will add a question to its smokeless tobacco Orders about total unit and dollar sales of these products to help the agency assess whether collection of more complete information about such products would be warranted.

Given the information presented by the Truth Initiative regarding the popularity of flavored smokeless tobacco, especially among youth (*id.* at 4), and the Commission's collection of flavor information regarding cigarettes (and recently e-cigarettes), the Commission will modify its smokeless tobacco 6(b) Orders to seek information regarding the flavors of smokeless tobacco products.

The Commission believes that its product placement questions that ask about "motion picture(s)" and "television show(s)" cover "original shows streamed via the internet." On the other hand, the Commission sees no harm in clarifying that is the case and intends to do so.

The Truth Initiative correctly points out that the federal minimum age to purchase tobacco is now 21. *Id.* at 6. The Commission will use the term "underage persons" in lieu of

“youth” in its 6(b) Orders and define “underage persons” as persons younger than 21 years of age.

*IV. Altria*

Altria stated that the Commission should no longer collect any information from cigarette and smokeless tobacco manufacturers “due to the Food and Drug Administration’s ... extensive, active regulatory authority over tobacco products under the Family Smoking Prevention and Tobacco Control Act.” Altria at 1. Because FDA has the authority to require tobacco product manufacturers to submit additional information to promulgate additional regulations regarding advertising and promotion of tobacco products, Altria calls the Commission’s collections “superfluous” and unnecessary “burdens.” *Id.* at 2. Altria also contends that “responding to FTC’s collection requests requires several full-time employees (across multiple departments and operating companies) to spend weeks compiling data, revising reports, and reviewing ledgers before preparing for submission to FTC” and that this effort takes “far longer than 180 hours” estimated by the Commission as the “average annual burden on manufacturers.” *Id.* at 2.

The FTC staff and FDA staff have a long tradition of working together on the many areas where the two agencies share jurisdiction. However, since the FDA is not collecting cigarette or smokeless tobacco sales and marketing expenditure data like that required by the Commission’s 6(b) Orders, there is no overlap or duplication with respect to such data. The Commission intends to continue collecting cigarette and smokeless tobacco sales and marketing expenditure data. To the extent that in the future FDA duplicates the FTC’s data collection, the FTC can modify or cease its collection.

Altria contends that the Commission underestimates its burden in responding to the FTC’s information collection and that its burden is “far longer than 180 hours.” The

Commission’s burden estimate of 180 hours was an average for the nine largest recipients of the Commission’s information request. The recipients vary greatly in size, in the number of products that they sell, and in the extent and variety of their advertising and promotion. Our burden estimate clearly stated that the very largest recipients might require hundreds of hours. Altria, which owns Philip Morris USA and the U.S. Smokeless Tobacco Co., says on its website that its “tobacco companies ... have been the undisputed market leaders in the U.S. tobacco industry for decades.”<sup>3</sup> Altria’s comment is consistent with the number of hours that its Philip Morris subsidiary previously told FTC staff that it spent complying with the Commission’s cigarette Order. All the other tobacco companies that responded to the FTC staff’s latest inquiries reported spending substantially fewer hours. We also note that Altria is the recipient of two 6(b) Orders, one for cigarettes and one for smokeless tobacco. To err on the side of caution, the Commission will increase its burden estimate from 1,980 hours to 2,940 hours.

**Burden Statement:**

*Estimated Annual Burden:* 2,940 hours<sup>4</sup>

*Estimated Number of Respondents:* 15 6(b) recipients (maximum)<sup>5</sup>

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<sup>3</sup> See [www.altria.com/about-altria?src=megaspotlight](http://www.altria.com/about-altria?src=megaspotlight).

<sup>4</sup> The Commission intends to use this PRA clearance renewal to collect information from the companies concerning their marketing and sales activities for the years 2021, 2022, and 2023. The Commission expects to issue compulsory process orders seeking this information annually, but it is possible that orders might not be issued in any given year and that orders seeking information for two years would be issued the next year. The figures set forth in this notice for the estimated hours and labor costs associated with this information collection represent average annual burden over the course of the prospective PRA clearance.

<sup>5</sup> Since three and possibly more of these 6(b) recipients are parent companies that have separately incorporated subsidiaries or affiliates that the FTC anticipates or expects that the parent companies will transmit the collection instrument to and seek information from, the proposal to send up to 15 6(b) Orders could equate to 20 “persons” under the PRA. See 5 CFR 1320.3(c)(4) (“[ten or more persons]...refers to the persons to whom a collection of information is addressed by the agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including...separately incorporated subsidiaries or affiliates.”).



These estimates include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent companies that receive the information requests.

*Estimated Average Burden Per Year Per Request:* 196 hours

- (a) Information requests to the four largest recipients<sup>6</sup> of the Commission's information request, at a per request average each year of 400 hours = 2,400 hours, cumulatively, per year; and
- (b) Information requests to nine additional respondents, of smaller size, at a per request average each year of 60 hours = 540 hours, cumulatively, per year.

*Estimated Annual Labor Cost:* \$294,000

*Estimated Capital or Other Non-Labor Cost:* de minimis

*Request for Comment*

Your comment -- including your name and your state -- will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential" —as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such

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<sup>6</sup> There are two tobacco companies that receive both a cigarette Order and a smokeless tobacco Order. Thus, this would equate to six requests for burden analysis.

as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

**Josephine Liu,**

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*for Legal Counsel.*

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